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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6242 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

FATMABIBI D/O GULAM MOHMED AHMED KHAPEDI

Versus

HAWABIBI D/O GULAM M AHMED KHAPEDI

Appearance:

MR SH SANJANWALA for Petitioner
MR VJ DESAI for Respondent No. 1
MR HC PATEL, AGP for Respondent No. 5

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 14/06/2001

ORAL JUDGEMENT

1. The petitioner has filed present petition under Articles 226 and 227 of the Constitution of India challenging the judgment and order of Special Secretary dated 11.2.1988. The Special Secretary by its judgment and order pleased to accept the revision application and pleased to quash and set aside the order of Collector as well as order of Deputy Collector and City Survey Superintendent and thereafter entry which was made on 18th March, 1964, may be continued and all names of applicants as per the custom of Muslim Law may be entered.

2. The facts giving rise to this petition are as under:

2.1 The dispute in the present proceeding relate to Nondh No.14/A and 14/B situated at Tika No.6, City Survey No.14, Ward Rander at Surat. It has been found from the record that property originally stood in the name of father of Fatmabibi as well as Hawabibi namely Gulam Mohmd Ahmed Khapedi. On his death in 1951, the property was transferred in the name of his widow Aishabibi, major heirs Fatmabibi Ismail Gulam Mohammed and the mother made an application to have her name as guardian be deleted. Thus the property in 1962 stood in the names of all the heirs of the deceased Gulam Mohammed Ahmed Khapedi. In 1979 when the appellant applied to the City Survey Officer to have the name of Ayeshabibi deleted as a result of her death in 1975, they realised that a partition of the property was made as 14-A and 14-B of 70 and 92 sq.mts. and one of the portion was mutated in the name of the respondent.

2.2 Being aggrieved by this partition which is believed to have been done in 1964, Hawabibi applied to the City Survey Superintendent who rejected the application on ground that it was not admissible since a passage of time had taken place. In view of this, the said property was divided between heirs in 1964 and entry to that effect was made by City Survey Superintendent on 28th May, 1980 and entry to that effect that partition is legal and proper. The petitioner has produced the said entry dated 28th May, 1980, which has been done by City Survey Superintendent, Surat, in this behalf.

2.3 Being aggrieved and dissatisfied with the said order, Hawabibi daughter of Gulam Mohmd Ahmed Khapedi, respondent filed appeal before Chorasi Prant, Surat. The Assistant Collector, Surat, by his order dated 21.10.1980 admitted the matter and directed that the case to be reheard as instructed above and hence remanded to the City Survey Superintendent.

2.4 Being aggrieved and dissatisfied with the said order, Fatmabibi-present petitioner filed appeal being Appeal No.18/81 before the Deputy Collector, Surat. The Deputy Collector, Surat by his judgment and order dated 30.7.1982 pleased to allow the appeal and held that as regards property in question i.e. property situated at Ward No.16 at Rander, Tika No.6-14 thereafter division dated 18.3.1964 be continued and also directed that as regards 14-A is concerned Fatmabibi may be continued as

owner and as regards 14-B is concerned Aiyasabibi widow of Gulam Mohmd Ahmed Khapedi may be continued.

2.5 Being aggrieved and dissatisfied with the aforesaid order of the Deputy Collector, Hawabibi present respondent filed revision No.61/84 before Chief Secretary, Revenue Department, State of Gujarat. The Chief Secretary by its order dated 11.2.88 held that the entry has been made pursuant to the entry dated 18.3.1964 be continued as per the provisions of the Muslim Law in this behalf. The Chief Secretary, Revenue Department, observed that the property was divided as per the division made on 18.3.1964 and the same has been continued in this behalf. According to the authority the document of agreement of sell dated 18.3.64 which was not registered and therefore the same cannot be acted upon and therefore whatever the names continued prior to agreement to sell may be continued as per the provisions of the Muslim Law.

3. On behalf of the petitioner Shri Sanjanwala, learned Senior Counsel has tried to assail the order of the authority on various grounds. He stated that the order of the authority is patently bad and illegal and without jurisdiction as it does not come with the revisional power of Special Secretary. He further submitted that entries which were made on 18th April, 1964, as per the document could not have been set aside after such a long time. He submitted that document dated 18th March, 1964, is in nature of memorandum of partition and it does not require registration and therefore the sole basis of the decision of the Special Secretary that since the property involved in the document is more than 100 rupees, it is required to be affected by registered document because it is contrary to the Registration Act. It merely says that it is memorandum of partition and it is not required to be registered.

3.1 Shri Sanjanwala, learned Counsel for the petitioner has also relied upon judgment of this Court dated 3.3.99 passed by M.R.Calla, J. However, looking to the facts and circumstances of the case, the said case is not applicable to the facts and circumstances of the case.

4. On the other hand, Shri V.J.Desai, learned advocate appears on behalf of the respondent and has tried to support the order of the Special Secretary in this behalf. He submitted that the document dated 18th March, 1964, is clearly in agreement to sell and it does create the right, title and interest. He has referred to

document dated 18th March, 1964, and the said document did provide that property in question be sold to brother-in-law Ismail Gulam Mohmd Ahmed which is immovable property which is registered in municipal record. This agreement does create right in favour of the parties and also extinguish rights in favour of certain parties and therefore it does require registration in this behalf.

4.1 Learned advocate for the respondent has relied upon Sec.135(C) of the Bombay Land Revenue Act which provides for acquisition of rights to be reported and Sec.135(D) which provides for register of mutations and register of disputed cases. He has also relied upon Sec.54 of the Transfer of Property Act in this behalf. He has also relied upon judgment of the Hon'ble Supreme Court in the case of Ram Baran Prasad Vs. Mohit Hazra and others reported in AIR 1967 SC 744. He has relied upon para 11 of the said judgment which reads as under:

"But there has been a change in the legal position in India since the passing of the Transfer of Property Act. Section 54 of the Act states that a contract for sale of immovable property "does not, of itself, create any interest in or charge on such property."

"Reading S.14 along with S.54 of the Transfer of Property Act it is manifest that a mere contract for sale of immoveable property does not create any interest in the immoveable property and it, therefore, follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of S. 40 of the Transfer of Property Act makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice."

"But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption because S.40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

5. In my view, therefore, in view of the provisions of Sec.135(C) and 135(D) of the Bombay Land Revenue Code and Sec.54 of the Transfer of Property Act and judgment of Ram Baran Prasad (supra), the reasonings of the authority that document dated 18th March, 1964, requires registration and unless the same is not registered it cannot create rights in favour of the parties, in view of the same the findings of the Special Secretary that whatever rights and entries which were prior to 18th March, 1964, ordered continued as provisions of law is legal and valid in this behalf. There is no error of law in the order of Special Secretary and therefore under Articles 226 and 227 of the Constitution of India, I do not find any infirmity in the order of the Special Secretary and therefore the petition is required to be dismissed and accordingly the same is dismissed. Rule is discharged with no order as to costs.

5.1 When the matter was placed for hearing on 14th September, 1988, this Court (Coram: G.T.Nanavati, J.) issued Rule and also granted interim relief in terms of Para (B) that the authority may not implement the order dated 11.2.88 passed by Special Secretary. In view of this aforesaid order, the interim relief which has been granted earlier shall stand vacated.

(K.M. Mehta, J.)

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